9-18-01

# SUPREME COURT OF LOUISIANA

No. 2001-CC-0175

CLECO CORPORATION

Versus

LEONARD JOHNSON AND LEGION INDEMNITY COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF ST. TAMMANY

WILLIAMS, Justice *Pro Tempore*[*]

This court granted certiorari to determine whether a utility company has a cause of action, through subrogation, to recover for direct physical damages sustained by its customers to their electrical equipment caused by a power surge when a driver of a dump truck struck a utility pole. We hold that a cause of action exists for the customers to recover damages to their property resulting from the power surge caused by defendant's negligence. Furthermore, accepting the allegations in plaintiff's petition as true, we presume, for the purposes of this opinion, that Cleco has been subrogated to the claims of its customers. Accordingly, we remand this case to the trial court for further proceedings.

## FACTS AND PROCEDURAL HISTORY

On October 15, 1997, defendant, Leonard Johnson, was operating a commercial dump truck in a subdivision in Mandeville. Johnson backed the truck into a utility pole owned by plaintiff, Cleco Corporation, an electric utility company. The impact caused certain mechanical wire ties to break, and one of the conductor supports snapped,

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[*]Judge Felicia Toney Williams of the Second Circuit Court of Appeal, assigned as Justice *Pro Tempore*, sitting for Associate Justice Bernette J. Johnson; Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore,* sitting for Associate Justice Harry T. Lemmon.

causing a voltage surge. The surge caused property damage to electrical appliances and equipment of various Cleco customers. Cleco paid a total of $94,020.45 to the one hundred eighty-seven residents and businesses in the area to compensate them for damages to their electrical equipment.

Cleco filed suit against Johnson and his insurer, Legion Indemnity Company, to recover the amounts paid to its customers for their damages. Cleco alleged that it has been subrogated to the rights of its customers. Defendants filed a peremptory exception of no cause of action, or, alternatively, motion for summary judgment, contending that Cleco has no cause of action for the recovery of amounts paid to its customers for damages caused by the power surge. In response, Cleco filed a cross motion for summary judgment. The trial court denied both motions for summary judgment and the exception of no cause of action without assigning written reasons.

Defendants filed an application for supervisory writs, and the court of appeal granted the writ application, reversed the trial court's ruling, and granted defendants' exception of no cause of action, citing *Professional Answering Service, Inc. v. Central Louisiana Electric Co.*, 521 So.2d 549 (La.App. 1 Cir. 1988). *Cleco Corporation v. Johnson*, 99-0808 (La.App. 1 Cir. 1/7/00) ___ So.2d ___. Cleco sought review of the court of appeal's decision with this court, and this court unanimously granted the writ application and remanded this matter to the court of appeal "for briefing and opinion and argument in accordance with their rules." *Cleco Corporation v. Johnson*, 00-0389 (La. 4/28/00), 760 So.2d 1164.

On remand, the court of appeal affirmed its previous disposition, citing *Professional Answering Service, Inc. v. Central Louisiana Electric Co., Inc.*, 521 So.2d 549 (La.App. 1 Cir. 1988) and determined that Cleco may seek recovery for damages to its utility pole, but neither Cleco nor its customers have a cause of action

for damages sustained by the customers.[2] *Cleco Corporation v. Johnson*, 99-0808 (La.App. 1 Cir. 12/22/00), 775 So.2d 1228.

Cleco filed an application for certiorari, and by an order dated March 23, 2001, this court granted the application. *Cleco Corporation v. Johnson*, 01-0175 (La. 3/23/01), ___ So.2d ___.

DISCUSSION

The function of the peremptory exception of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. *Louisiana Paddlewheels v. Louisiana Gaming Com'n*, 94-2015 (La. 11/30/94), 646 So. 2d 885. The exception is tried on the face of the pleadings and the court accepts the facts alleged in the petition as true, determining whether the law affords relief to the plaintiff if those facts are proved at trial. *Barrie v. Exterminators, Inc.*, 93-0679 La. 10/18/93, 625 So. 2d 1007. In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal and this court should subject the case to de novo review because the exception raises a question of law, and the lower court's decision is based only on the sufficiency of the petition. *Mott v. River Parish Maintenance*, 432 So. 2d 827 (La.5/27/83).

In this case, Cleco alleges that Johnson caused physical damage to the property of one hundred eighty-seven of its customers when he struck Cleco's utility pole. Notably, however, it is not the customers who have brought these claims against Johnson. Rather, Cleco is the plaintiff seeking $94,020.45 in compensation for the money it expended in settling the claims of the customers. Consequently, two issues are presented herein: (1) whether Cleco's customers had a claim against Johnson for

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[2]Neither party sought writ of certiorari concerning the court of appeal's holding that Cleco may seek recovery for the direct damages to the utility pole. Therefore, that issue is not before this court.

the damage suffered, and (2) whether Cleco is entitled to assert such claim. Because we did not grant the writ application to address the issue of whether Cleco is subrogated to the claims of its customers, we will dispose of it as a preliminary matter.

Assuming that Cleco's customers is entitled to pursue a cause of action against Johnson for the damage caused to their property when Johnson struck Cleco's utility pole, Cleco is only permitted to bring that claim if it currently holds its customers' claims through an assignment of rights, sale of a litigious right, conventional or legal subrogation, or some other legal theory.

In its petition, Cleco asserts:

> Cleco has paid in its own name the damages reflected on Exhibit "B" to its customers and has been subrogated to their rights against defendants herein.

Whether Cleco will be able to prove it was subrogated to its customers' rights is not before us. Instead, the review of an exception of no cause of action requires that we presume the allegations of the petition for damages are true and determine whether the law affords a remedy to Cleco. Based on the petition for damages, Cleco has been subrogated to the claims of its customers. Accordingly, we now turn to the issue which prompted us to grant Cleco's application for writ of certiorari — whether Cleco's customers had a claim against Johnson for the physical damage to the customers' property after Johnson struck a utility pole owned by Cleco.

To support its conclusion that neither Cleco nor its customers have a cause of action for the damages sustained by the customers, the court of appeal explained that since the damages suffered by Cleco's customers do not fall within the scope of the duty imposed on the truck driver not to negligently damage Cleco's power lines, there is insufficient ease of association between the duty breached and the damages sustained. Cleco contends that the court of appeal erred in applying a rigid prohibition

against third party damage claims, rather than analyzing and applying the "ease of association" test. Cleco also urges that the appellate court expanded *Professional Answering Service* to constitute a blanket prohibition.

In *Professional Answering Service*, the court reasoned that under a duty/risk analysis, a person who damages electrical lines does not have a duty to customers who suffer economic losses or property damages as a result. *Professional Answering Service* relied heavily on this court's decision in *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984), which involved a situation where the defendant's dredging operations damaged a gas pipeline owned by Texaco. Texaco had a contract to supply gas to PPG. As a result of the damage to the pipeline, PPG was forced to obtain gas from other sources, so PPG sued Bean Dredging, seeking recovery of the additional costs expended to obtain gas. This court held that PPG's damages did not fall within the scope of the duty not to damage a pipeline owned by Texaco. We stated:

> There is clearly an ease of association in the present case between the rule of law which imposes a duty not to negligently damage property belonging to another and the risk of injury sustained by Texaco because of the damage to its property. As noted, however, a rule of law is seldom intended to protect every person against every risk. It is much more difficult to associate the same rule of law, in terms of the moral, social and economic values involved, with the risk of injury and the economic loss sustained by the person whose only interest in the pipeline damaged by the tortfeasor's negligence arose from a contract to purchase gas from the pipeline owner. It is highly unlikely that the moral, social and economic considerations underlying the imposition of a duty not to negligently injure property encompass the risk that a third party who has contracted with the owner of the injured property will thereby suffer an economic loss.
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> Moreover, imposition of responsibility on the tortfeasor for such damages could create liability "in an indeterminate amount for an indeterminate time to an indeterminate class." [citation omitted]. If any of PPG's employees were laid off

> while PPG sought to obtain another source of fuel for its plant, they arguably sustained damages which in all likelihood would not have occurred *but for* defendant's negligence. If any of PPG's customers had contracted to purchase products that PPG could not produce and deliver because of the accident, perhaps they sustained damages which in all likelihood would not have occurred *but for* defendant's negligence. Because the list of possible victims and the extent of the economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages.

*Id*. at 1061-62.

Unlike the plaintiff in *Bean Dredging*, Cleco is not attempting to recover from any economic damages it sustained as a result of damage to a third party's property. By contrast, it is seeking to recover amounts it expended as a result of damage to its own property, the pole, which led to damages to the customers' property. There is no "indeterminate class" in this case. Cleco alleges that it compensated one hundred eighty-seven customers for the direct physical damage to the customers' equipment as a result of the power surge caused by defendants' actions. A trier of fact may find that there is an ease of association between a person who damages an electrical pole, causing a power surge and the damage to electrical equipment in the homes and businesses supplied with power by the damaged electrical pole. Defendants' action was not an *indirect* cause of damage to the equipment; rather, defendants' action was the *direct* cause.

A similar issue was presented in *Istre v. Fidelity Fire & Casualty Ins. Co.*, 628 So.2d 1229 (La.App. 3 Cir. 1993); *writ denied*, 643 So.2d 852 (La. 1994). In that case, a backhoe operator working for a construction company came into contact with electrical lines causing a power outage that knocked out electrical power to a traffic signal some distance away. Approximately one hour later, the plaintiff was involved in an accident due to the traffic light outage. The plaintiff subsequently filed suit

against several parties, including the construction company. In finding the construction company liable, the court stated:

> The construction company's main argument is that its duty to avoid knocking out electrical power does not extend to the risk that one hour later, a driver at an intersection four miles away, will fail to see that traffic lights are not working and that other drivers were treating the intersection as a four-way stop, out of turn, and hurt another driver who was entering the intersection in obedience to a four-way stop rotation. To this it pleads that the company could not have known that engaging this one power line would create a general outage affecting signal lights four miles away.
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> We reject this argument. This backhoe operator knew the risk of his backhoe knocking out power. His construction company knew or should have known the risks to people and property caused by power outages, and the predictability of widespread effects and delays in restoring power. The increased risk of an accident caused by this defendant's conduct was still present when the accident occurred. This accident to this plaintiff was reasonably foreseeable. This defendant is liable to the plaintiffs for the breach of its duty.

*Id*. at 1232.

We find that the direct physical damage to the customers' equipment, for which Cleco attempts to recover, is more akin to the direct physical damages suffered by the plaintiff in *Istre*, rather than the indirect economic damages at issue in *Professional Answering Service*. If it is foreseeable that damage to electrical lines could cause a power outage and a resulting automobile accident, a trier of fact may conclude that it is foreseeable that such damage could cause a power surge which would harm electrical customers' equipment.

Accepting the factual allegations in Cleco's petition as true, for the aforementioned reasons, we find that the law extends a remedy to Cleco and its customers. Accordingly, we hold that the court of appeal erred in granting defendants' exception of no cause of action.

## DECREE

The court of appeal's decision to reverse the trial court's ruling and grant defendants' exception of no cause of action is hereby reversed, and this matter is remanded to the trial court for further proceedings.

REVERSED AND REMANDED